IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 27012-2-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
BRANDON LYNN VANWINKLE,	)	
	)	**UNPUBLISHED OPINION**
Appellant.	)	
	)	

Schultheis, C.J. — Brandon VanWinkle appeals his conviction of felony bail jumping. He contends the "to-convict" instruction was faulty and the trial court improperly assessed jury fees against him. In his pro se statement of additional grounds, Mr. VanWinkle also contends that his speedy trial rights were violated and the prosecutor improperly commented on suppressed evidence. We affirm his conviction but remand for elimination of jury costs.

FACTS

On July 30, 2007, the State charged Mr. VanWinkle by amended information with second degree malicious mischief and fourth degree assault. On October 31, Mr.

VanWinkle failed to appear for his court appearance and the State filed a third amended information adding one count of bail jumping.

A jury trial was held in March 2008. The to-convict jury instruction stated in pertinent part:

> To convict the defendant of the crime of bail jumping as charged in the Information, each of the following elements of the crime must be proved beyond a reasonable doubt:
> (1) That on or about the 31st of October, 2007 defendant knowingly failed to appear before a court;
> (2) That the defendant was charged with Assault in the fourth degree and Malicious Mischief in the second degree.

Clerk's Papers (CP) at 60.

Mr. VanWinkle was ultimately acquitted of the assault and malicious mischief charges but convicted of bail jumping. The court imposed a standard range sentence of 20 months. Mr. VanWinkle appeals.

ANALYSIS

Mr. VanWinkle claims that the to-convict jury instruction for bail jumping is constitutionally faulty because it referenced the fourth degree assault, a gross misdemeanor. Noting that bail jumping is a misdemeanor if the accused is held for, charged with, or convicted of a gross misdemeanor, Mr. VanWinkle argues, "If the jury convicted defendant of Bail Jumping based on his Assault 4º charge, then he should have been sentenced only for misdemeanor Bail Jumping under *Blakely*.[1]" Br. of Appellant at

7. He claims that because the general verdict does not indicate which charge the jury relied on in convicting him of bail jumping, the conviction must be reversed and remanded for entry of a misdemeanor bail jumping conviction.

We review the sufficiency of a to-convict instruction de novo. *State v. Williams*, 162 Wn.2d 177, 182, 170 P.3d 30 (2007). "[A] 'to convict' instruction must contain all of the elements of the crime because it serves as a 'yardstick' by which the jury measures the evidence to determine guilt or innocence." *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997).

In *State v. Pope*, 100 Wn. App. 624, 999 P.2d 51 (2000), Division Two of this court reversed a defendant's conviction for bail jumping because the to-convict instruction referred to a "felony matter" but did not identify the felony. The court held that this omission rendered the instruction constitutionally infirm, noting that "one of the elements of bail jumping is that the defendant was held for, charged with, or convicted of a particular crime." *Id.* at 629.

Here, the to-convict instruction clearly identified the two particular crimes Mr. VanWinkle was charged with—"Assault in the fourth degree *and* Malicious Mischief in the second degree." CP at 60 (emphasis added). Furthermore, the bail jumping verdict form referenced count III of the information, which indicated that the defendant had

[1] *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

failed to appear after being charged with second degree malicious mischief, a class B or C felony.[2] In view of the instruction and the verdict form, there was no danger that the jury potentially misunderstood the underlying charge or charges. Accordingly, Mr. VanWinkle's claim that the to-convict instruction was faulty is without merit.

Next, Mr. VanWinkle argues that because of the ambiguity of the underlying crime, the court erred in sentencing him for felony bail jumping. He contends that his sentence violates *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), which requires the State to prove any fact that increases a sentence beyond the statutory maximum.

We reject his argument. The State correctly points out that *Blakely* only applies to facts that increase the penalty beyond the statutory maximum. *Blakely*, 542 U.S. at 303. Here, Mr. VanWinkle's sentence was within the standard range of 17-22 months. Accordingly, *Blakely* does not apply here.

We also note that "[w]hile the *penalties* for bail jumping are divided into classes, the *crime* itself is not." *State v. Gonzalez-Lopez*, 132 Wn. App. 622, 635, 132 P.3d 1128

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[2] Count III of the third amended information provided:

"That the said **BRANDON LYNN VANWINKLE** in the County of Benton, State of Washington, on or about the 31st day of October, 2007, in violation of RCW 9A.76.170(1), having been released by court order with the requirement of a subsequent personal appearance before Benton County Superior Court . . ., after being charged with a class B or C felony Malicious Mischief in the Second Degree did knowingly fail to appear as required, contrary to the form of the Statute." CP at 83.

(2006). "Therefore, the classification for sentencing purposes of both the underlying offense and the bail jumping charge is a question of law for the judge." *Williams*, 162 Wn.2d at 191. The trial court did not err in sentencing Mr. VanWinkle to felony bail jumping.

Finally, Mr. VanWinkle contends that the trial court erred in assessing two jury fees when there was only one trial. The State concedes error, correctly noting that although the court imposed a $250 jury fee for February 11, 2008, jurors were never called to the courtroom or sworn in on that date.

RCW 10.46.190 provides that "[e]very person convicted of a crime . . . shall be liable to all the costs of the proceedings against him or her, including, when tried by a jury in the superior court . . ., a jury fee." Here, the trial court assessed jury demand fees on February 11, 2008 and March 3, 2008. Because there was no trial on February 11, 2008, the jury fees for that date should be stricken.

Statement of Additional Grounds (SAG)

In his SAG, Mr. VanWinkle contends that his speedy trial rights were violated and that the prosecutor improperly commented on suppressed evidence. However, Mr. VanWinkle fails to refer to the record or cite any case law to support his argument. While a SAG need not contain references to the record or legal citation, it will not be considered "if it does not inform the court of the nature and occurrence of alleged errors."

RAP 10.10(c). Furthermore, we are not required to search the record to find support for the defendant's claims. RAP 10.10(c). Mr. VanWinkle's grounds are not sufficiently developed to allow review; therefore, we are unable to consider them.

CONCLUSION

Mr. VanWinkle's bail jumping conviction is affirmed. We remand with instructions to the trial court to strike jury costs for February 11, 2008.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Schultheis, C.J.

WE CONCUR:

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Brown, J.

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Kulik, J.